

**Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Petition of the State Independent Alliance and the)	
Independent Telecommunications Group for a)	
Declaratory Ruling that the Basic Universal)	WT-Docket No. 00-239
Service Offering Provided by Western Wireless in)	
Kansas is Subject to Regulation as Local Exchange)	
Service)	
)	

MEMORANDUM OPINION AND ORDER

Adopted: June 4, 2002

Released: August 2, 2002

By the Commission: Commissioner Abernathy concurring and issuing a statement; Commissioner Martin dissenting and issuing a statement.

TABLE OF CONTENTS

	<u>Paragraph No.</u>
I. INTRODUCTION	1
II. BACKGROUND	2
A. CMRS Classification	2
B. Western Wireless' BUS Offering	8
C. Independents' Petition	10
III. DISCUSSION	15
A. Classification of Western Wireless' BUS Offering as CMRS	16
B. Effects of CMRS Classification	30
IV. CONCLUSION	34
V. ORDERING CLAUSE	35

APPENDIX : List of Commenters

I. INTRODUCTION

1. On November 3, 2000, the State Independent Alliance and Independent Telecommunications Group (Independents)¹ filed a petition for declaratory ruling (Independents' Petition)

¹ Independents include 37 independent rural telephone companies, all of the independent rural telephone companies operating in Kansas. Independents' Petition at 1.

requesting that the Commission clarify that Western Wireless² Basic Universal Service (BUS) offering in Kansas is not a Commercial Mobile Radio Service (CMRS) and, therefore, that federal law does not preempt or preclude the Kansas Corporation Commission (Kansas Commission) from applying to the BUS offering those regulations and Universal Service Fund (USF) requirements applicable to wireline local exchange carriers (LECs) and to eligible telecommunications carriers (ETCs) in Kansas.³ Independents also request that the Commission advise the Kansas Commission that the BUS offering is subject to federal LEC regulation.⁴ In this order, we deny Independents' Petition because we conclude that Western Wireless' BUS is a CMRS offering. Therefore, Kansas may not regulate BUS entry or rates and may not require equal access for telephone toll services, although it may regulate the other terms and conditions of BUS.⁵ We further clarify that Western Wireless is not subject to federal regulation as a LEC with respect to the BUS offering.

II. BACKGROUND

A. CMRS Classification

2. Section 3(27) of the Communications Act of 1934, as amended,⁶ defines a "mobile service," in pertinent part, as "radio communication service carried on between mobile stations or receivers and land stations, and by mobile stations communicating among themselves."⁷ The Commission has a long history of regulating mobile radio services for the purpose of encouraging the growth of the mobile services industry so that consumers will have greater options for meeting their communications needs.⁸ In 1993, Congress amended section 332 of the Act to define a "commercial mobile service" as "any mobile service (as defined in section 3) that is provided for profit and makes interconnected service available (A) to the public or (B) to such classes of eligible users as to be effectively available to a substantial portion of the public."⁹ Congress created the commercial mobile service classification in order to ensure consistent treatment of functionally similar mobile services at an appropriate level of regulation and establish a competitive nationwide market for CMRS with limited

² Western Wireless is a provider of cellular telecommunications services operating under the name of Cellular One in 19 states. Western Wireless Comments at 2.

³ Independents' Petition at 19 (requesting that the Commission "declare that Western Wireless' BUS offering in Kansas is not CMRS and that federal law does not prohibit or preempt Kansas from applying to it the same regulations and USF requirements that generally apply to all local exchange carriers' services").

⁴ *Id.*

⁵ See 47 U.S.C. §§ 332(c)(3), 332(c)(8).

⁶ 47 U.S.C. §§ 151 *et seq.* (the Communications Act or the Act).

⁷ 47 U.S.C. §153(27).

⁸ Implementation of Sections 3(n) and 332 of the Communications Act, GN Docket No. 93-252, Second Report and Order, 9 FCC Rcd 1411, 1414, ¶ 3 (1994) (*CMRS Second Report and Order*).

⁹ See Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Public Law No. 103-66, Title VI, §§ 6002(b)(2)(A), 6002(b)(2)(3), 107 Stat. 312, 392 (1993) (1993 Amendments)); 47 U.S.C § 332(d)(1). In place of the statutory term "commercial mobile service," the Commission uses the term CMRS. See 47 C.F.R. § 20.3 (defining CMRS).

regulation.¹⁰

3. In 1994, in the *CMRS Second Report and Order*, the Commission revised its wireless service rules to implement the new statutory provisions governing CMRS.¹¹ In the *CMRS Second Report and Order*, the Commission generally distinguished mobile from fixed wireless services for purposes of implementing section 332.¹² The Commission held that “services provided through dual-use equipment . . . capable of transmitting while the platform is moving” are mobile.¹³ On the other hand, the Commission held that services “provided to or from a transportable platform that cannot move when the communications service is offered should not be included” in mobile service.¹⁴

4. The Commission subsequently amended its rules in the *CMRS Flex Order* to allow CMRS carriers to provide fixed wireless services on a co-primary basis with commercial mobile services.¹⁵ The Commission reasoned that this rule change would allow the carriers greater flexibility to provide innovative wireless services to meet consumers’ demands. The Commission also concluded that permitting fixed services on a co-primary basis with mobile services would stimulate wireless competition in the local exchange market.¹⁶ The Commission’s decision to allow co-primary fixed use of CMRS spectrum raised the related issue of how such fixed service offerings should be classified for regulatory purposes. In the *Second CMRS Flex Order*, the Commission concluded that because of the evolving nature of fixed and hybrid wireless services, it would decide the regulatory treatment of such services on a case-by-case basis.¹⁷ The Commission offered that to the extent a party requires a determination of whether or not a particular service that includes a fixed wireless component should be treated as CMRS, that party should petition for a declaratory ruling.¹⁸

5. In addition to the co-primary offering of fixed wireless services authorized in the *CMRS Flex Order*, the Commission has long permitted CMRS providers to offer services that are ancillary, auxiliary, or incidental to their primary mobile offerings, without change to their regulatory

¹⁰ See *CMRS Second Report and Order*, 9 FCC Rcd at 1417-19, ¶¶ 13-17.

¹¹ See generally, *id.*, 9 FCC Rcd 1411.

¹² *Id.* at 1424-25, ¶¶ 36, 38.

¹³ *Id.* at 1425, ¶ 38.

¹⁴ *Id.* See also 47 C.F.R. § 20.9(a), (a)(7).

¹⁵ Amendment of the Commission’s Rules to Permit Flexible Service Offerings in the Commercial Mobile Radio Services, WT Docket No. 96-6, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 8965, 8977, ¶ 24 (1996) (*CMRS Flex Order*). By not having any thresholds or ceilings on the relative levels of fixed or mobile services associated with the term “co-primary,” the Commission allowed providers to choose to provide exclusively fixed services, exclusively mobile service, or any combination of the two. *Id.*

¹⁶ *Id.* at 8967, ¶ 3.

¹⁷ Amendment of the Commission’s Rules to Permit Flexible Service Offerings in the Commercial Mobile Radio Service, WT Docket No. 96-6, Second Report and Order and Order on Reconsideration, 15 FCC Rcd 14680, 14683, ¶ 7, 14687, ¶ 15 (2000) (*Second CMRS Flex Order*).

¹⁸ *Id.* at 14683, ¶ 8.

classification.¹⁹ Pursuant to section 22.323, the provision of incidental services by Part 22 licensees is expressly authorized subject to certain conditions intended to protect mobile cellular service and its subscribers.²⁰ These conditions include: (a) the costs and charges of subscribers who do not wish to use incidental services are not increased as a result of provision of incidental services to other subscribers; (b) the quality of the primary public mobile service does not materially deteriorate as a result of provision of incidental services, and neither growth nor availability of the primary public mobile service is significantly diminished as a result of provision of incidental services; and (c) the provision of the incidental services is not inconsistent with the Communications Act of 1934, as amended, or with the Commission's rules and policies. In the *CMRS Second Report and Order*, the Commission concluded that fixed services that are ancillary or auxiliary to CMRS would be regulated as CMRS.²¹ In the *Second CMRS Flex Order*, the Commission reaffirmed that ancillary, auxiliary, and incidental services offered by CMRS providers are regulated as CMRS.²²

6. Pursuant to section 332(c)(3), state or local governments may not, with very limited exceptions, regulate the entry of or the rates charged by CMRS providers.²³ States may, however, regulate other terms and conditions of CMRS,²⁴ such as customer billing practices and consumer protection requirements.²⁵ States may also impose on CMRS providers requirements related to universal service, although such requirements may not constitute rate or entry regulation.²⁶ In addition, a CMRS

¹⁹ See, e.g., 47 C.F.R. §§ 20.7(g), 20.9(a), 22.323.

²⁰ 47 C.F.R. § 22.323. See also 47 C.F.R. § 22.901(d)(2) (exempting alternative technology and co-primary fixed services from the requirements of §22.323). We are currently considering in another proceeding whether to revise or eliminate these conditions on the provision of incidental services, and indeed whether the explicit authorization of incidental service in section 22.323 remains necessary at all in light of the Commission's subsequent granting of broader flexibility to cellular and other CMRS providers in the *CMRS Flex* proceeding (WT Docket No. 96-6). See Year 2000 Biennial Regulatory Review – Amendment of Part 22 of the Commission's Rules to Modify or Eliminate Outdated Rules Affecting the Cellular Radiotelephone Service and other Commercial Mobile Radio Services, WT Docket No. 01-108, Notice of Proposed Rulemaking, 16 FCC Rcd 11169, 11171, ¶ 5 (2001) (*Part 22 Biennial Review NPRM*).

²¹ *CMRS Second Report and Order*, 9 FCC Rcd at 1424, ¶36.

²² *Second CMRS Flex Order*, 15 FCC Rcd at 14684, ¶ 9; see also *CMRS Flex Order*, 11 FCC Rcd at 8985, ¶ 48.

²³ 47 U.S.C. § 332(c)(3). A state may petition for authority to regulate CMRS rates if it can demonstrate that either of two conditions is met: "(i) market conditions with respect to such services fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory; or (ii) such market conditions exist and such service is a replacement for land line telephone exchange service for a substantial portion of the telephone land line exchange service within such State." 47 U.S.C. § 332(c)(3)(A).

²⁴ 47 U.S.C. § 332(c)(3).

²⁵ Southwestern Bell Mobile Systems, Inc., Petition for a Declaratory Ruling Regarding the Just and Reasonable Nature of, and State Challenges to, Rates Charged by CMRS Providers when Charging for Incoming Calls and Charging for Calls in Whole-Minute Increments, 14 FCC Rcd 19898, 19901, ¶ 7 (1999) (*Southwestern Bell Petition*), citing H-R Rep. No. 103-111, 103rd Congress, 1st Sess. 211, 261, reprinted at 1993 U.S.C.C.A.N. 378, 588.

²⁶ Pittencrieff Communications Inc. Petition for Declaratory Ruling Regarding Preemption of the Texas Public Utility Regulatory Act of 1995, 13 FCC Rcd 1735, 1748, ¶ 25 (1997) (*Pittencrieff Communications*), *aff'd sub nom. CTIA v. FCC*, 168 F.3d 1332 (D.C. Cir. 1999). In addition, notwithstanding the prohibition against state rate (continued....)

provider may not be required to provide equal access to common carriers for the provision of telephone toll services.²⁷

7. CMRS providers generally are not subject to regulation as LECs even if they provide telephone exchange and exchange access services.²⁸ The Commission may define CMRS providers that offer local exchange service as LECs under section 153(26), but it has not taken that action.²⁹ Thus, CMRS providers are not subject to the statutory requirements imposed on LECs in section 251(b) of the Act or on incumbent LECs in section 251(c).³⁰ The Commission has, however, extended by regulation requirements similar to some of those in section 251(b) to CMRS providers.³¹ In addition, the Commission has forbore from applying many of the requirements in the Act to both CMRS providers and competitive LECs (CLECs) based on their lack of market power.³²

B. Western Wireless' BUS Offering

8. BUS is described and marketed by Western Wireless as wireless local loop service or Wireless Residential Service, a substitute for local exchange service designed to compete with traditional wireline local exchange service.³³ The BUS offering is provided over Western Wireless' cellular facilities as one of its cellular offerings.³⁴ Western Wireless charges a flat rate of \$14.99 per month for the BUS

(Continued from previous page) _____

and entry regulation of CMRS, where CMRS is a substitute for landline telephone exchange service for a substantial portion of the communications within a state, a state may enforce requirements "imposed on all providers of telecommunications services necessary to ensure the universal availability of telecommunications service at affordable rates." 47 U.S.C. § 332(c)(3).

²⁷ 47 U.S.C. § 332(c)(8).

²⁸ See 47 U.S.C. § 153(26) (defining LEC as "any person that is engaged in the provision of telephone exchange service or exchange access," but "such term [LEC] does not include a person insofar as such person is engaged in the provision of a commercial mobile service under section 332(c), except to the extent that the Commission finds that such service should be included in the definition of such term.").

²⁹ *Id.* See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers, CC Docket No. 95-185, First Report and Order, 11 FCC Rcd 15499, 15995-96, ¶ 1004 (1996) (*Local Competition Order*) (declining to classify CMRS providers as LECs).

³⁰ 47 U.S.C. §§ 251(b), (c).

³¹ See Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services, CC Docket No. 94-54, First Report and Order, 11 FCC Rcd 18455, 18468, ¶ 21 (1996) (imposing resale requirements on an interim basis until November 2002). See also Cellular Telecommunications Industry Association's Petition for Forbearance From Commercial Mobile Radio Services Number Portability Obligations, WT Docket No. 98-229, Order on Reconsideration, 15 FCC Rcd 4727 (2000) (imposing certain number portability service provider requirements on wireless carriers in the top 100 MSAs effective November 24, 2002).

³² See Forbearance from Applying Provisions of the Communications Act to Wireless Telecommunications Carriers, WT Docket No. 98-100, First Report and Order, 15 FCC Rcd 17414, 17425-26, ¶ 26 (2000).

³³ Western Wireless Comments at 4-5, Exhibit C.

³⁴ *Id.* at 3-4. Western Wireless states that BUS is transmitted over the same frequencies as Western Wireless' other cellular offerings (824 MHz–899 MHz) using the same towers, transmitters, receivers, and other equipment. (continued....)

offering, which includes unlimited local calls and an expanded local calling area.³⁵ Outside the local calling area, BUS users incur roaming charges on the same basis as other cellular customers. Using the wireless access unit, a BUS subscriber can make calls in portions of eastern Kansas without incurring roaming charges, and in other areas of the country while incurring roaming charges.³⁶

9. The BUS subscriber receives service through a Telular terminal (wireless access unit),³⁷ a laptop-sized unit owned by Western Wireless, which provides a dial tone and to which the customer connects a conventional telephone.³⁸ Some of the wireless access units can also be used to connect fax and computer equipment.³⁹ The wireless access unit is powered by electricity from an electrical outlet or by battery,⁴⁰ and can be used with or without an external antenna.⁴¹ The wireless access unit is approximately 2.76 inches x 12.9 inches x 11.8 inches⁴² and weighs 8.3 pounds including the built-in battery.⁴³ The battery provides up to one hour of talk time and eight hours of standby time.⁴⁴ The unit can be operated while in motion (*e.g.*, in a car or truck) using battery power.⁴⁵ The unit operates at 3 watts, which is more powerful than conventional cellular hand-held units, but is similar in power and degree of mobility to early cellular “bag phones.”⁴⁶

C. Independents’ Petition

(Continued from previous page) _____

Id. at 3. Western Wireless states that its cellular network cannot distinguish among the types of equipment used by its customers. *Id.* at 4, n. 4.

³⁵ *Id.* at 3.

³⁶ Letter from Angela E. Giancarlo, Counsel for Western Wireless, to Magalie Roman Salas, Secretary, FCC, dated May 18, 2001 (Western Wireless May 18 Letter) at 2-4.

³⁷ The Telular product description for Phonecell SX3i states that it contains “[e]verything you need in a sleek package. The Phonecell SX for AMPS [Advanced Mobile Phone System] Fixed Wireless Terminal provides access to home, office, or any remote location where phone service is needed and cellular networks are available.” The SX3i includes a roaming option. Independents’ Petition at Attachment C.

³⁸ Western Wireless Comments at 4.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ Western Wireless Reply at 4, n. 11. The wireless access unit comes with a short antenna; a larger high gain antenna for exterior mounting on a building is optional.

⁴² Independents Reply at 10, n. 38.

⁴³ Letter from Angela E. Giancarlo, Counsel for Western Wireless, to Magalie Roman Sales, Secretary, FCC, dated May 8, 2001 (Western Wireless May 8 Letter) at 2.

⁴⁴ *Id.*

⁴⁵ Western Wireless Comments at 20; Western Wireless May 8 Letter at 3-6.

⁴⁶ Independents’ Petition, Attachment D, Kansas Hearing, Testimony of James Blundell, Western Wireless at 63; Western Wireless Comments at 4.

10. In response to the *Second CMRS Flex Order*, Independents filed a petition for declaratory ruling requesting that the Commission find that Western Wireless' BUS offering is subject to regulation as a local exchange service provided by a LEC, not as a mobile service provided by a CMRS provider.⁴⁷ Independents state that Western Wireless' BUS offering is a fixed service, intended as a substitute for wireline telephone service, and not a mobile service within the meaning of the Act and the Commission's rules.⁴⁸

11. Independents further note that the Kansas Commission has designated Western Wireless as an ETC for non-rural and rural areas for the provision of BUS, enabling Western Wireless to receive universal service funds in those areas.⁴⁹ Thus, Independents argue that both as a matter of statutory interpretation and to ensure that Western Wireless is subject to regulation similar to that applicable to the carriers with which it competes and to other recipients of universal service funds, the Commission should find that Western Wireless is not a CMRS provider when it offers BUS.⁵⁰ Independents state that in designating Western Wireless an ETC, the Kansas Commission assumed that BUS is CMRS and therefore is not subject to certain regulations.⁵¹ Independents identify five areas of Kansas regulation as being of particular concern: certificate of public convenience and authority, equal access, customers' ability to list their numbers in white pages directories, determining the service location for USF purposes when the customer is mobile, and internet access at a minimum data transmission speed of 19.2 kbps.⁵²

12. In addition, Independents request that in order to end confusion and controversy regarding the status of the BUS offering in Kansas and other states, the Commission clarify that USF

⁴⁷ Independents' Petition at 19.

⁴⁸ *Id.* at 10-11.

⁴⁹ *Id.* at 3-4. See Order #6 Granting Sprint PCS and Western Wireless ETC Designation in Non-Rural Telephone Company Wire Center for Federal Universal Service Support Purposes, Kansas Commission Docket Nos. 99-GCCZ-156-ETC and 99-SSLC-173-ETC (Jan. 19, 2000) and Order #7 On Reconsideration, Kansas Commission Docket Nos. 99-GCCZ-156-ETC and 99-SSLC-173-ETC (February 29, 2000). Independents' Petition at 2, Attachment H. On October 12, 2001, the Kansas Commission further designated Western Wireless an ETC for its provision of BUS in rural areas of Kansas. Kansas Commission, Order on Petition of Western Wireless for Designation as an Eligible Telecommunications Carrier, Docket No. 99-GCCZ-156-ETC (October 12, 2001) (*Kansas Rural ETC Designation Order*). Independents state that they are seeking reconsideration of that decision. Letter from John B. Adams, Counsel for Independents, to Magalie Roman Sales, Secretary, FCC, dated November 6, 2001 (Independents November 6 Letter) at 1.

⁵⁰ Independents also argue that even if Western Wireless' BUS is a CMRS offering, it should be subject to LEC regulation because Western Wireless offers the service as a substitute for wireline service for a substantial portion of the state and because BUS is a universal service offering. Independents' Petition at 18, n. 48.

⁵¹ *Id.* at 14-16. In designating Western Wireless as an ETC in rural areas, the Kansas Commission expressly declined to reach a conclusion regarding whether the BUS offering is CMRS. *Kansas Rural ETC Designation Order* at 7, ¶ 15.

⁵² Independents' Petition at 14-16. The Commission has subsequently adopted rules designating the mobile customer's billing address as the basis for determining the customer's location for the purpose of delivery of high-cost universal service support. *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Fourteenth Report and Order, Twenty-Second Order on Reconsideration, and Further Notice of Proposed Rulemaking, 16 FCC Rcd 11244, 11314-15, ¶¶ 180-81 (2001).

requirements and LEC regulations apply to that offering in Kansas.⁵³ Independents also request that the Commission clarify that because BUS is a LEC service, Western Wireless is subject to federal regulations applicable to CLECs when it provides BUS.⁵⁴

13. In response to a public notice seeking comment on Independents' Petition, eighteen parties filed comments and eleven parties filed replies.⁵⁵ Western Wireless opposes the Petition, arguing that BUS is a mobile service regulated as CMRS, not a LEC service. Western Wireless argues that BUS should be regulated as CMRS because it is inextricably linked with Western Wireless' other cellular offerings,⁵⁶ and that even viewed in isolation, BUS satisfies the Commission's definition of mobile service because of the mobility afforded to subscribers.⁵⁷ Western Wireless asserts that BUS can also be viewed as incidental, ancillary, or auxiliary to Western Wireless' traditional cellular service.⁵⁸ Western Wireless further argues that Congress has established that CMRS providers of local exchange service shall be regulated differently from incumbents because they do not have market power, and that CMRS providers are not potentially subject to state and federal regulation until CMRS provides a substantial portion of the communications in a state.⁵⁹

14. The Kansas Commission takes no position on the merits of Independents' Petition, but supports clarification of whether the BUS offering is CMRS under federal law and, if so, whether the BUS offering is excepted from the preemption set forth in section 332(c)(3)(A) of the Act.⁶⁰ The Kansas Commission clarifies that only incumbent LECs are required to comply with the 19.2 kbps internet access requirement. In addition, the Kansas Commission clarifies that Western Wireless intends to work with LECs for publication of BUS customer numbers in the LECs' white pages.⁶¹

III. DISCUSSION

15. We deny Independents' Petition because we conclude that BUS is a CMRS offering. We

⁵³ Independents' Petition at v, 19; Independents Reply at 19-20.

⁵⁴ Independents' Petition at 16-17. Independents argue, for example, that Western Wireless is subject to the requirements of section 251(b), which is applicable to LECs. *Id.* at 19.

⁵⁵ See Wireless Telecommunications Bureau Seeks Comment on Petition for Declaratory Ruling that Western Wireless' Basic Universal Service in Kansas is Subject to Regulation as Local Exchange Service, Docket No. 00-239, Public Notice, DA 00-2622 (rel. Nov. 21, 2000). Parties filing comments and reply comments in this proceeding are listed in the Appendix.

⁵⁶ Western Wireless Comments at 13-15.

⁵⁷ *Id.* at 16-17.

⁵⁸ *Id.*; Western Wireless Reply at 4.

⁵⁹ Western Wireless Comments at 26-27. Western Wireless notes that in order for a state successfully to petition for relief from the preemption provision in section 332(c)(3), there must be a showing that a CMRS provider has such market dominance that customers are not protected from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory. *Id.* at 26, n.57.

⁶⁰ Kansas Commission Comments at 4.

⁶¹ *Id.* at 2-3.

conclude that BUS is properly classified as CMRS for two independently sufficient reasons: (1) it meets the definition of “mobile” service under the statute and the Commission’s rules; and (2) it is ancillary, auxiliary, or incidental to Western Wireless’ provision of traditional cellular service. Thus, under section 332(c) of the Act, Kansas may not regulate BUS rates and entry or impose equal access requirements on BUS, although it may regulate other terms and conditions of BUS.⁶² We also clarify that none of the exceptions to the proscription of state rate regulation in section 332(c)(3) apply, and that Western Wireless is not subject to federal LEC regulation when providing BUS.

A. Classification of Western Wireless’ BUS Offering as CMRS

16. *Mobility of the BUS Offering.* The analysis of whether BUS should be classified as CMRS begins with the statutory definition of “commercial mobile service.” In section 332 of the Act, Congress defined commercial mobile service as “any mobile service (as defined in section 3) that is provided for profit and makes interconnected service available (A) to the public or (B) to such classes of eligible users as to be effectively available to a substantial portion of the public.”⁶³ Section 3(27) of the Communications Act defines a “mobile service,” in pertinent part, as “radio communication service carried on between mobile stations or receivers and land stations, and by mobile stations communicating among themselves.”⁶⁴ Section 3(28) of the Communications Act in turn defines a “mobile station” as “a radio-communication station capable of being moved and which ordinarily does move.”⁶⁵ The definition of mobile station and the pertinent language in the definition of mobile service were included in the Communications Act of 1934 when it was adopted.⁶⁶ Congress did not make any relevant changes to

⁶² 47 U.S.C. §§ 332(c)(3), 332(c)(8).

⁶³ 47 U.S.C. § 332(d)(1); *see also* 47 C.F.R. § 20.3 (defining CMRS).

⁶⁴ Mobile service is defined in section 3(27) of the Act as:

“a radio communication service carried on between mobile stations or receivers and land stations, and by mobile stations communicating among themselves, and includes (A) both one-way and two-way radio communications services, (B) a mobile service which provides a regularly interacting group of base, mobile, portable, and associated control and relay stations (whether licensed on an individual, cooperative, or multiple basis) for private one-way or two-way land mobile radio communications by eligible users over designated areas of operation, and (C) any service for which a license is required in a personal communications service established pursuant to the proceeding entitled ‘Amendment to the Commission’s Rules to Establish New Personal Communications Services’ (GEN Docket No. 90-314; ET Docket No. 92-100), or any successor proceeding.”

47 U.S.C. § 153(27). We note that while the Senate initially proposed expressly to exclude fixed wireless service from the statutory definition of mobile services, the House definition, which did not expressly exclude fixed services, was ultimately adopted. *See* H.R. Conf. Rep. No. 103-213 (1993) (Conference Report) at 497.

⁶⁵ 47 U.S.C. § 153(28). “Radio communication” is defined in section 3(33) of the Act as “the transmission by radio of writing, signs, signals, pictures, and sounds of all kinds, including instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission.” 47 U.S.C. § 153(33).

⁶⁶ The definition of mobile station was originally adopted in the 1927 International Radiotelegraph Convention (1927 Convention). The 1927 Convention also defined fixed station as a “station permanently located and communicating with one or more stations similarly located.” *See* 45 Stat. 2848. Thus, the 1927 Convention distinguished a fixed station, which does not move and is permanently located, from a mobile station that is capable of moving and ordinarily does move.

(continued....)

either of these definitions in the 1993 or the 1996 Amendments to the Act.⁶⁷

17. Applying the statutory definition of mobile station to the BUS offering, we conclude, based on all the facts before us, that Western Wireless' BUS offering is a mobile service and thus CMRS.⁶⁸ The statutory definition of mobile station has two prongs: (1) it is capable of being moved; and (2) it ordinarily does move. As Independents acknowledge, there is no question that the BUS offering meets the first prong of the definition.⁶⁹ The wireless access unit used to provide BUS operates much like a conventional cellular telephone in that it is not limited to operating at a fixed location.⁷⁰ As described by Western Wireless, the wireless access unit can be "picked up, placed in a car, rolled down the road and taken to the barn."⁷¹ This capability distinguishes BUS from fixed services such as Basic Exchange Telephone Radio Systems (BETRS), as well as the services commonly offered over the Local Multipoint Distribution Service (LMDS), Digital Electronic Messaging Service (DEMS), and 39 GHz bands.⁷² Independents and other parties argue that BUS is like BETRS because of the nature of the service, because BUS provides the last mile to the customer, and because the BUS wireless access unit is similar in size to the BETRS transceiver and has backup batteries but is not primarily battery-powered.⁷³ We agree, however, with Western Wireless that the key difference between BETRS and BUS is that the radio equipment used to provide BETRS is limited to a specific location and can only operate at that location.⁷⁴ Thus, the equipment used to provide BETRS, unlike BUS, does not satisfy the first prong of the definition (Continued from previous page) _____

Mobile service was defined in the Act in 1934 to mean, "the radio-communication service carried on between mobile stations and land stations, and by mobile stations communicating among themselves." Communications Act of 1934 § 3(n). Max D. Paglin, *A Legislative History of the Communications Act of 1934* 923 (Oxford University Press 1989).

⁶⁷ See 1993 Amendments; Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat.56, codified at 47 U.S.C. §§ 151 et seq. (1996 Amendments).

⁶⁸ There is no question that the BUS offering satisfies the other elements of CMRS set forth in section 332(d)(1) of the Act and in section 20.3 of the Commission's rules. See 47 U.S.C. § 332(d)(1); 47 C.F.R. § 20.3.

⁶⁹ Independents' Petition at v; Independents Reply at 17.

⁷⁰ Western Wireless May 18 Letter at 2.

⁷¹ Western Wireless Comments at 20-21.

⁷² In the *CMRS Second Report and Order*, the Commission concluded that BETRS is a fixed service subject to potential rate regulation as LEC service. See *CMRS Second Report and Order*, 9 FCC Rcd at 1425, ¶38 ("the substitution of a radio loop for a wire loop in the provision of BETRS does not constitute mobile service."). See also *Status of Radio and Equipment Used in the Basic Exchange Telephone Service*, Memorandum Opinion and Order, 4 FCC Rcd 2224, 2224-25 ¶¶ 4, 7 (CCB 1989) (*BETRS Equipment Order*); Amendment of Parts 2 and 22 of the Commission's Rules to Permit Liberalization of Technology and Auxiliary Service Offerings in the Domestic Public Cellular Radio Telecommunications Service, GEN Docket No. 87-390, Report and Order, 3 FCC Rcd 7033, 7041, ¶ 66 (1988) (*Auxiliary Cellular Services Order*).

⁷³ Independents' Petition at 10-11; NTCA Comments at 1-3; South Dakota Independents Comments at 2; Staurulakis Comments at 8-9.

⁷⁴ Western Wireless Comments at 19; RTG Comments at 4 n. 6; see *CMRS Second Report and Order*, 9 FCC Rcd at 1425, ¶ 38.

of mobile station.

18. We conclude also that the BUS terminal equipment “ordinarily does move,” consistent with the second prong of the definition of mobile station, based on uncontradicted evidence in the record as a whole that mobile operation is an intended and actual use of the BUS equipment and service. First, the record indicates that the BUS equipment is not only capable of moving, but is specifically designed to operate while in motion with the same seamless hand-off capability as any other cellular phone.⁷⁵ Second, Western Wireless has presented evidence that its representatives demonstrate the mobility of BUS to customers,⁷⁶ and that under the terms of the BUS offering, customers are allowed unlimited use within Western Wireless’ local service area as well as roaming on Western Wireless’ system outside the local service area.⁷⁷ Third, Western Wireless has provided evidence of actual mobile use by BUS customers who have incurred roaming charges, thus demonstrating that the customers have used the service while away from home.⁷⁸

19. Taking all these facts together, we find that there is sufficient evidence in the record to support the conclusion that the BUS terminal equipment meets the second prong of the statutory definition. The fact that the BUS unit is capable of operating while moving is a significant indicator that mobile use is an intended “ordinary” use, because otherwise Western Wireless would have had no reason to invest in equipment with cellular hand-off capability. Western Wireless’ express provision for mobility and roaming in the terms of service similarly supports our conclusion.⁷⁹ Finally, the fact that customers have used the service on a roaming basis provides evidence that mobile use is not out of the ordinary. Indeed, the customer bills provided by Western Wireless may understate actual mobile use, because they only reflect roaming use outside of Western Wireless’ local service area, which covers most of eastern Kansas, and do not measure mobile use by BUS customers within the local service area.⁸⁰

20. We emphasize that our holding is a narrow one based on the particular facts in the record before us. If, for example, the customer’s ability to move and operate a wireless unit were limited either by a lack of technical capability in the unit or by restrictions on mobility imposed by the service provider, such facts could raise significant additional issues about whether the service was mobile. Nevertheless,

⁷⁵ Western Wireless Comments at ii, 2-4; Western Wireless May 18 Letter at 2-4.

⁷⁶ Western Wireless May 8 Letter at 3-4.

⁷⁷ Western Wireless May 18 Letter at 2-4.

⁷⁸ Western Wireless May 8 Letter at 3-4.

⁷⁹ We note, for example, that in North Dakota, Western Wireless initially used a service agreement that prohibited movement of the wireless access unit by the customer. Western Wireless subsequently deleted that requirement, and that requirement does not exist in the Kansas BUS offering. State of North Dakota, Public Service Commission, Case No. PU-1564-99-17, Findings of Fact, Conclusions of Law and Order on Remand, November 22, 2000 at 2. Nebraska Independents state that in Nebraska the mobile portion of Western Wireless’ BUS-like offering is limited to a defined community. Nebraska Independents Comments at 3. The Nebraska Commission, however, noted the benefits of mobility available to subscribers from the service. Application No. C-1889 of GCC License Corporation seeking designation as an eligible telecommunications carrier (ETC) that may receive universal service support, Nebraska Public Service Commission, Nov. 21, 2000 at 8, ¶ 35 (*Nebraska Order*), *aff’d State of Nebraska, Public Service Commission v. Arlington Telephone Company*, No. S-01-343, June 28, 2002.

⁸⁰ Western Wireless May 18 Letter at 2-4.

we reject the Independents' argument that meeting the second prong of the statutory test requires an affirmative showing that customers usually or typically use the wireless unit while mobile. The record indicates that the BUS unit is capable of both fixed and mobile use, and that while some customers use the mobile features of the BUS service, others may not.⁸¹ However, if we were to classify the service as fixed or mobile based on how individual customers choose to use their units, such an approach would be unworkable from a regulatory standpoint because the subjective and varying behavior of particular customers could alter the regulatory status of the service.⁸² In addition, classifying BUS as a fixed offering based on the assumption that most actual use is fixed, as the Independents advocate, would discount the mobility that is an inherent part of the service offering. Therefore, instead of analyzing customer usage patterns, we conclude that the second prong of the statutory test is met if mobile operation is an inherent part of the service offering that is reasonably likely and not an extraordinary or aberrational use of the equipment. The record evidence presented by Western, which is not disputed by the Independents, meets this standard.

21. Our conclusion that the BUS service meets the statutory definition of a mobile service is also supported by Commission rules and precedent. Although the Commission has never expressly interpreted the statutory language, it has developed, in decisions and rules adopted over a long period of time, certain criteria for defining what is "mobile," consistent with the Act. In numerous rule provisions adopted over many years, the Commission has consistently defined mobile station to require that the station operate while moving or from unspecified locations, as an objective means of distinguishing a fixed station that operates from one specific location.⁸³ For example, a mobile station that is used in a cellular service, as are the stations at issue in this proceeding, is defined in section 22.99 of the Commission's rules as "one or more transmitters that are capable of operation while in motion."⁸⁴ The Commission's rules of general applicability similarly define mobile station as a "station in the mobile service intended to be used while in motion or during halts at unspecified points."⁸⁵ In the *CMRS Second Report and Order*, the Commission concluded that "services provided through dual-use equipment . . . capable of transmitting while the platform is moving" are included as mobile.⁸⁶ The example the Commission provided was the Inmarsat-M terminal, which is capable of operation while in motion.⁸⁷ In

⁸¹ See Western Wireless Comments at 20-21.

⁸² Independents' Petition at v; Independents Reply at 17; Staurulakis Reply at 11-12.

⁸³ Many of these rules were in place when Congress established the CMRS classification and redefined mobile service in 1993 and adopted the 1996 Amendments to the Act, and Congress did not change the Commission's definition of mobile station.

⁸⁴ 47 C.F.R. § 22.99.

⁸⁵ 47 C.F.R. § 2.1. See also 47 C.F.R. §§ 24.5 (Personal Communications Services), 25.201 (Satellite Communications), and 101.3 (Fixed Microwave Services). The definition in section 2.1 of the Commission's rules was adopted by the Radio Regulations annexed to the 1947 International Telecommunications Convention ratified by the United States in 1949. 63 Stat. 1399. By contrast, section 2.1 defines fixed service as "[a] radio communication service between specified fixed points." 47 C.F.R. § 2.1.

⁸⁶ *CMRS Second Report and Order*, 9 FCC Rcd at 1425, ¶ 38; see also *CMRS Flex Order*, 11 FCC Rcd at 8969, ¶ 7.

⁸⁷ *CMRS Second Report and Order*, 9 FCC Rcd at 1425, ¶ 38. The Inmarsat mobile earth station or Inmarsat-M terminal is defined at Article 1(i) of the amended text of the Inmarsat Convention as an "earth station in the mobile-satellite service intended to be used while in motion or during halts at unspecified points." See Communications (continued....)

the *CMRS Flex Order*, the Commission stated that a mobile service “allows the end user to communicate while moving to or from different locations,” while “fixed service requires the end user to be at a set location.”⁸⁸ None of these rules or precedents suggests a definition of mobility that depends on how most customers actually use a piece of equipment or service.

22. We also disagree with Independents and other commenters who argue that the BUS unit is too large and difficult to move to be considered a mobile station.⁸⁹ We do not find that the unit’s size or relative inconvenience compared to a conventional cellular handset precludes our finding that BUS is a mobile offering. The BUS unit has dimensions and weight comparable to a laptop computer or to older model car phones and bag phones, all of which are expressly designed for mobile use.⁹⁰ Indeed, although the size of mobile cellular customer equipment has decreased over time due to improvements in technology,⁹¹ older and bulkier cellular equipment remains classified as mobile notwithstanding the more compact equipment in prevalent use today.⁹² Moreover, the Commission continues to recognize that equipment similar in size to the BUS unit can be classified as mobile. For example, in 1996 the Commission approved the use of laptop-sized mini Inmarsat-M terminals to provide satellite mobile

(Continued from previous page)

Satellite Corporation Applications for Authority to Provide International Land Mobile-Satellite Services Outside of North America via the Inmarsat System, Memorandum Opinion, Order and Certificate, 8 FCC Rcd 638, 639, ¶5 & n.7 (1993). The Inmarsat-M terminal is larger than the mini Inmarsat-M terminal, which is described as laptop-sized. Both terminals are used in the mobile satellite service. See Application of Comsat Corporation for Authority under Section 504(c) of the International Maritime Satellite Telecommunications Act of 1978 and Section 214 of the Communications Act of 1934, as amended, to Provide its Authorized Inmarsat Services via the Inmarsat Third Generation Communications Satellites, File Nos. ITC 95-422, CSS-94-012, Memorandum Opinion and Order, 11 FCC Rcd 7953, 7966, ¶ 34 (1996) (*Inmarsat-M Order*).

⁸⁸ *CMRS Flex Order*, 11 FCC Rcd 8969, ¶ 6, n. 13. See also Amendment of Parts 2 and 87 of the Commission’s Rules to Provide for the Licensing of Radionavigation Land Test Stations, Docket No. 15579, Memorandum Opinion and Order, 1 FCC 2d 773, 774, ¶ 5 (1965) (finding that a station that is “authorized for and restricted to a specific geographical location, such as a landing area or manufacturer’s plant” is considered to be at a fixed location and therefore does not comply with the definition of mobile station: “one that basically is used while in motion or during halts at unspecified points.”).

⁸⁹ Independents’ Petition at 8-10. See also Beacon Comments at 3 (arguing that the service agreement for BUS filed with the Kansas Commission states that BUS customer premises transmission will be at adequate volume and free of excessive distortions at the customer’s residence, and repair is at the customer’s residence); Staurulakis Reply at 11-13 (arguing that the BUS wireless access unit is not a mobile station because it is intended ordinarily to be used while plugged into an electric outlet and because the unit has no handle, earpiece, speaker, or mouthpiece, and thus cannot be used without additional attached equipment); South Dakota Independents Comments at 3-5; Townes Reply at 4.

⁹⁰ Western Wireless Comments at 18. Western Wireless notes that analog bag phones that are bulky and have a limited battery capacity are considered CMRS. *Id.* at 19. See also Independents’ Petition, Attachment D, Kansas Hearing, Testimony of James Blundell at 63.

⁹¹ Dobson Comments at 4; Western Wireless Comments at 4.

⁹² Early cellular “bag phones” could be moved from one location to another and used for standby and limited on-line operation. See Regis J. (Bud) Bates & Donald W. Gregory, *Voice & Data Communications Handbook* 833 (McGraw-Hill 3rd Ed. 2000) (*Voice & Data Communications Handbook*).

service.⁹³

23. Independents also argue that the purpose of BUS is to substitute for local exchange service, and therefore it must be a fixed service and regulated as a LEC service.⁹⁴ For example, Independents argue that BUS is marketed as a fixed service, which shows Western Wireless' intent.⁹⁵ Independents also argue that Western Wireless does not intend BUS to be mobile because BUS is priced (\$14.99) such that it would "cannibalize" Western Wireless' mobile service offering.⁹⁶ In addition, Independents assert that the wireless access unit is network equipment owned by Western Wireless, not customer equipment.⁹⁷ We do not find these arguments compelling. As discussed above, the Commission has already concluded that the provision of local exchange service by a wireless carrier does not make the carrier a LEC, and Congress exempted from the definition of LEC the provision of local exchange service by CMRS providers.⁹⁸ Moreover, service using conventional cellular equipment also is sometimes marketed as a substitute for wireline local exchange service, and such offerings are clearly mobile. For example, Leap Wireless and US Cellular provide flat rate mobile local service as a substitute for wireline local telephone service.⁹⁹

⁹³ *Inmarsat-M Order*, 11 FCC Rcd at 7966, ¶ 34. Western Wireless notes that satellite telephony classified as CMRS relies on bulky equipment. Western Wireless Comments at 18, citing *CMRS Second Report and Order*, 9 FCC Rcd at 1457-58, ¶ 109. Independents argue that the Inmarsat-M unit, unlike BUS, is intended to and does ordinarily move. Independents Reply at 18. Independents also argue that Western Wireless does not intend for customers to use BUS as a mobile service. Independents Reply at 11. Independents fail, however, to explain convincingly this asserted difference between the BUS wireless access unit and the Inmarsat-M terminal.

⁹⁴ Independents' Petition at 6-7, 17. *See also* USTA Comments at 4 (arguing that it is the nature of the service that determines the classification); NTCA Comments at 2 & n.4; Williamson Reply at 5.

⁹⁵ Independents Reply at 12-14. Western Wireless argues that its name for the service to alert customers that it is a substitute for land line service is not determinative of the service type. Western Wireless Comments at 20. Western Wireless states that in marketing BUS to customers, the mobility of the wireless access unit "is most definitely a selling point." Western Wireless May 8 Letter at 3.

⁹⁶ Independents Reply at 11. *But see* Western Wireless Reply at 2-3 (arguing that BUS is one of several cellular service offerings and that the important factor is that the BUS offering is mobile).

⁹⁷ Independents' Petition at 8, n. 19. *But see* Western Wireless Comments at 13 (noting that cellular providers can bundle customer equipment with their services).

⁹⁸ *Local Competition Order*, 11 FCC Rcd at 15995-96, ¶ 1004; 47 U.S.C. § 153(26). The legislative history of section 332(c)(3)(A) indicates that the mere showing that a CMRS carrier is providing a substitute for landline service is not sufficient to support LEC regulation. The Conference Report states that "the Commission should permit States to regulate radio service providers for basic telephone service if subscribers have no alternative means of obtaining basic telephone service." Conference Report at 493.

⁹⁹ CMRS carriers providing substitute local exchange service using conventional cell phones include: Sprint PCS, U.S. Cellular, Leap Wireless International, ALLTEL, and Rural Cellular. *See* Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services, 16 FCC Rcd 13350, 13382-83 (2001); *see also* Celco Partnership d/b/a Bell Atlantic Mobile Petition for Designation as an Eligible Telecommunications Carrier, 15 FCC Rcd 39 (CCB 2000) (designating Verizon Wireless an ETC); Western Wireless Reply at 6 n. 17; Dobson Comments at 3.

24. Independents further argue that BUS should not be regulated as a CMRS offering because Western Wireless has requested USF support for the BUS offering.¹⁰⁰ We note that the requirements for designation as an ETC providing universal service are set forth in the Act and in the Commission's orders.¹⁰¹ In the *Universal Service* proceeding, the Commission concluded that telecommunications carriers that provide universal service as delineated in the Commission's rules are eligible to receive USF, regardless of the technology used to provide the service.¹⁰² Thus, a telecommunications carrier, including a wireless carrier, can be designated by a state or the Commission as an ETC whether it provides a fixed or a mobile universal service offering if it complies with the requirements for designation as an ETC. Pursuant to these rules, the Common Carrier Bureau has granted Western Wireless ETC status in Wyoming for a BUS-like universal service offering.¹⁰³

25. Finally, we note that Kansas and other states have treated the provision of BUS and similar services by Western Wireless as CMRS for regulatory purposes.¹⁰⁴ Although the Kansas Commission has declined to resolve the legal question of whether the BUS offering is mobile, in practical effect Kansas is currently treating Western Wireless' provision of BUS as a CMRS offering.¹⁰⁵ North Dakota has concluded that a similar service provided by Western Wireless is mobile, and many other

¹⁰⁰ Independents' Petition at 18; RUS Comments at 3.

¹⁰¹ Pursuant to section 214(e), the *Universal Service Order* requires that to be designated an ETC a telecommunications carrier must offer and advertise the services supported by the federal universal service support mechanism through the designated service areas. 47 U.S.C. §214(e)(1). Pursuant to section 254(c), the Commission has defined those services that are to be supported by the federal universal service mechanism. Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 8790, ¶ 22 (1997) (*Universal Service Order*).

¹⁰² *Universal Service Order*, 12 FCC Rcd at 8858, ¶ 145 (stating that "any telecommunications carrier using any technology, including wireless technology, is eligible to receive universal service support if it meets the criteria under section 214 (e)(1)"). With regard to equal access requirements for telecommunications carriers, the Commission did not include equal access to interexchange service among the services supported by universal service support mechanisms, concluding that such a requirement "would be contrary to the mandate of section 332(c)(8), which prohibits any requirement that CMRS providers offer 'equal access to common carriers for the provision of toll services.'" *Id.* at 8819, ¶ 78.

¹⁰³ Federal-State Joint Board on Universal Service, Western Wireless Petition for Designation as an Eligible Telecommunications Carrier in the State of Wyoming, CC Docket 96-45, Memorandum Opinion and Order, 16 FCC Rcd 48, 53, ¶ 11 (CCB 2000) (*Wyoming Order*) (granting Western Wireless ETC status in Wyoming and rejecting the implication that services offered by CMRS providers are ineligible for universal service support), *recon. denied*, 16 FCC Rcd 19144 (2001); *see also* Western Wireless Corporation Petition for Designation as an Eligible Telecommunications Carrier for the Pine Ridge Reservation in South Dakota, CC Docket 96-45, Memorandum Opinion and Order, 16 FCC Rcd 18133 (2001) (granting Western Wireless ETC status to provide service to the Pine Ridge Reservation in South Dakota).

¹⁰⁴ Kansas Commission Comments at 1; Western Wireless Comments at 5-6. States treat providers of local exchange service differently if they are not CMRS. In Iowa, for example, CLECs must obtain a certificate of public convenience and necessity, provide a service map, and file a tariff. Rural Iowa Independents Comments at 3. In Nebraska, CLECs are subject to rate benchmarks and earnings oversight. Nebraska Independents Comments at 4. *See also* Minnesota Independents Comments at 4.

¹⁰⁵ Western Wireless Comments at 12.

states have treated Western Wireless as a CMRS provider when it provides BUS-like services.¹⁰⁶ In this proceeding, neither Kansas nor any other state filed comments supporting the Independents' Petition.

26. *Ancillary, Auxiliary, or Incidental Nature of the BUS Offering.* We also conclude that even if BUS were not considered to meet the statutory definition of "mobile," it is still properly classified as CMRS because it is ancillary, auxiliary, or incidental to Western Wireless' provision of traditional mobile cellular service.¹⁰⁷ Section 22.323 of the Commission's rules specifically authorizes cellular and other Public Mobile Service carriers to use their authorized stations to provide other communications services incidental to the primary public mobile service for which the authorizations were issued. Section 22.323 provides that these carriers may provide incidental services if:

- (a) The costs and charges of subscribers who do not wish to use incidental services are not increased as a result of provision of incidental services to other subscribers;
- (b) The quality of the primary public mobile service does not materially deteriorate as a result of provision of incidental services, and neither growth nor availability of the primary public mobile service is significantly diminished as a result of provision of incidental services; and
- (c) The provision of the incidental services is not inconsistent with the Communications Act of 1934, as amended, or with FCC rules and policies.

47 C.F.R. §22.323.

27. We conclude that the Western Wireless BUS offering meets the criteria set forth in section 22.323, and is classifiable as an incidental service under Part 22.¹⁰⁸ BUS is provided over the

¹⁰⁶ As of August 17, 2001, Western Wireless had been granted ETC status in nonrural areas of twelve states and had been granted ETC status in rural areas of eight states, none of which is regulating Western Wireless as a LEC. Western Wireless Comments at 5-6 & nn. 6-7, 12 & n. 23; Letter from Angela E. Giancarlo, Counsel for Western Wireless, to Magalie Roman Salas, Secretary, FCC, dated Aug. 17, 2001, at Exhibit 1. The North Dakota Commission concluded that BUS "has mobile capabilities and is therefore mobile service." Western Wireless Comments at 11 & nn. 21, 22, *citing Wireless Corp v. Telephone Cooperative, Inc.* Complaint, NDPSC Case No. PU 1564-99-17, Finding of Fact, Conclusions of Law and Order (August 31, 1999), *aff'd on remand*, Findings of Fact, Conclusions of Law and Order on Remand (Nov. 22, 2000). The North Dakota Supreme Court affirmed the North Dakota Commission, concluding that Western Wireless' BUS-like offering in North Dakota is a mobile CMRS offering under the Commission's rules and interpretations. *Consolidated Telephone Cooperative v. Western Wireless*, 2001 WL 1658195 (ND). In addition, in Minnesota and Nebraska Western Wireless' universal service offerings are regulated as CMRS. Minnesota Independents Comments at 4; Nebraska Independents Comments at 2. The Nebraska Commission concluded that Western Wireless' offering provided the benefits of mobility. *See Nebraska Order* at 8, 13, ¶ 35.

¹⁰⁷ See Western Wireless Comments at 6, 13; Western Wireless Reply at 4; Sprint Comments at 7, 15-16; AT&T Wireless Comments at 3-4; US Cellular Reply at 3-4; Letter from Caressa D. Bennet, General Counsel, RTG, to Magalie Roman Salas, Secretary, FCC, dated April 26, 2001, at 2; RTG Comments at 5; CTIA Reply at 2.

¹⁰⁸ As noted above, we are currently considering in the *Part 22 Biennial Review* proceeding whether to revise or eliminate section 22.323 in light of the Commission's subsequent granting of broader flexibility to cellular and other CMRS providers in the *CMRS Flex* proceeding. See *supra* note 20. Even if we were to eliminate the rule, however, the criteria specified in the rule would remain relevant to our evaluation of whether BUS service is properly classified as incidental. Thus, if Western provided service over PCS spectrum, which is not a Part 22 service subject to section 22.323, we would find BUS to be incidental based on the same analysis we apply here.

same spectrum and infrastructure that Western Wireless uses to provide conventional mobile cellular service, and is in all respects the same as conventional mobile cellular service except for the customer equipment.¹⁰⁹ Western's cellular network does not distinguish operationally among BUS units and other types of customer equipment, enabling BUS customers to send and receive calls throughout the Western Wireless service area and to roam much like customers that take other cellular packages from Western Wireless.¹¹⁰ Moreover, BUS serves a minimal number of subscribers (386 or 0.835 percent) in comparison to approximately 45,000 traditional mobile cellular customers on Western's Kansas system.¹¹¹ Because BUS has few subscribers relative to Western's conventional cellular service, and the BUS equipment is indistinguishable to the network from other customer equipment, it is unlikely that provision of BUS would lead to diminution in the quality of service, an increase in costs, or other adverse effects on Western Wireless' primary cellular offerings.

28. It is also well-established that if the criteria set forth in the incidental services rule are met, a service provided by a cellular licensee can be treated as incidental for regulatory purposes even if the service is entirely fixed. In *Westcom*, the Commission specifically held that fixed cellular service could be provided as an incidental service.¹¹² In the *Second CMRS Flex Order*, the Commission reaffirmed its consistent holding that fixed services provided by CMRS providers over CMRS spectrum on an auxiliary, ancillary, or incidental basis are regulated as CMRS.¹¹³ Thus, even if we were to assume that BUS is a fixed rather than a mobile service, it would not affect our conclusion that the service is incidental, and therefore is properly regulated as CMRS.

29. On all the facts of this case, we conclude that BUS is incidental to Western Wireless' principal cellular service. We reject claims that BUS is not an ancillary, auxiliary, or incidental service because Western Wireless receives universal service funds for its provision of the BUS offering or because Western Wireless advertises BUS as a standalone product.¹¹⁴ Although ETC status is a prerequisite to the receipt of universal service funding, it is not relevant to whether a service is CMRS or LEC service for regulatory purposes.¹¹⁵ Moreover, advertising does not establish the regulations that apply to a service.

B. Effects of CMRS Classification

¹⁰⁹ See Western Wireless Comments at 6, 13; Western Wireless Reply at 4. Western Wireless states that BUS and all its other cellular offerings use the same antennas, cell sites, towers, trunk lines, mobile switching centers, and interconnection facilities. Western Wireless Comments at 4, n. 4.

¹¹⁰ Western Wireless Comments at 4.

¹¹¹ *Id.* at 2-3. See also RTG Comments at 4; Sprint Comments at 6-8.

¹¹² *Westcom Products, Inc.*, 102 FCC 2d 470, 472-73, ¶ 5, 475, ¶ 10 (1985) (*Westcom*).

¹¹³ See *Second CMRS Flex Order*, 15 FCC Rcd at 14684, ¶ 9; *CMRS Flex Order*, 11 FCC Rcd at 8968-8969, ¶¶ 5-7; see also *Auxiliary Cellular Services Order*, 3 FCC Rcd at 7041, ¶ 66 (incidental services may include fixed services); *CMRS Second Report and Order*, 9 FCC Rcd at 1424, ¶ 36 (all auxiliary and ancillary services provided by mobile service licensees are included within the definition of mobile services).

¹¹⁴ Independents Reply at 4, 6. See also Staurulakis Reply at 4.

¹¹⁵ *Universal Service Order*, 12 FCC Rcd at 8802, ¶ 49 (a common carrier using any technology, including CMRS, may qualify for designation so long as it complies with the section 214(e) eligibility criteria).

30. Pursuant to section 332(c)(3)(A), states may not regulate the entry or rates of CMRS providers.¹¹⁶ Thus, states are prohibited from requiring CMRS providers to obtain a certificate of public convenience and necessity or regulating CMRS rates.¹¹⁷ In addition, states are precluded from requiring CMRS providers to provide equal access to common carriers for the provision of telephone toll services.¹¹⁸ States may, however, regulate other terms and conditions of CMRS.¹¹⁹

31. Independents argue that Western Wireless should be subject to the same universal service requirements as CLECs in Kansas.¹²⁰ Unless the requirements imposed by the Kansas Commission are entry, rate, or equal access regulations, the Kansas Commission is not prevented from applying such requirements to CMRS ETCs consistent with the Act and the Commission's universal service regulations.¹²¹ Congress specified in section 254 of the Act the principles that should be used in establishing universal service policies.¹²² We do not have a record here to determine whether specific universal service regulations that the Kansas Commission may choose to impose constitute prohibited rate or entry regulations.¹²³

32. Independents suggest that even if we conclude that BUS is CMRS, Western Wireless

¹¹⁶ 47 U.S.C. § 332(c)(3)(A).

¹¹⁷ Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Twelfth Report and Order, Memorandum Order and Opinion, and Further Notice of Proposed Rulemaking, Promoting Deployment and Subscriberhip in Unserved and Underserved Areas, 15 FCC Rcd 12208, 12262, ¶ 110 (2000).

¹¹⁸ 47 U.S.C. § 332(c)(8).

¹¹⁹ 47 U.S.C. § 332(c)(3)(A). *See generally Southwestern Bell Petition*, 14 FCC Rcd 19898 (the CMRS industry is not exempt from the neutral application of state contractual or consumer fraud laws); Wireless Consumers Alliance, Inc., Petition for a Declaratory Ruling Concerning Whether the Provision of the Communications Act of 1934, as Amended, or the Jurisdiction of the Federal Communications Commission Thereunder, Serve to Preempt State Courts from Awarding Monetary Relief Against Commercial Mobile Radio Service (CMRS) Providers (a) for Violating State Consumer Protection Laws Prohibiting False Advertising and Other Fraudulent Business Practices, and/or (b) in the Context of Contractual Disputes and Tort Actions Adjudicated Under State Contract and Tort Laws, WT Docket No. 99-263, Memorandum Opinion and Order, 15 FCC Rcd 17021 (2000) (section 332 does not generally preempt the award of monetary damages by state courts based on state tort or contract claims); Petition of the Connecticut Department of Public Utility Control to Retain Regulatory Control of the Rates of Wholesale Cellular Service Providers in the State of Connecticut, PR Docket No. 94-106, Report and Order, 10 FCC Rcd 7025, 7060-7061, ¶¶ 79-82 (1995) (concluding that states may regulate terms and conditions of CMRS offerings), *aff'd sub nom. Connecticut Department of Public Utility Control v. FCC*, 78 F.3d 842 (2d Cir. 1996).

¹²⁰ Independents' Petition at 18 n. 48.

¹²¹ *See Pittencrieff Communications*, 13 FCC Rcd at 1748, ¶ 25; *see also* Federal-State Joint Board on Universal Service; Western Wireless Corporation Petition for Preemption of an Order of the South Dakota Public Utilities Commission, Declaratory Ruling, CC Docket No. 96-45, 15 FCC Rcd 15168 (2000) (discussing state commission limitations under section 253 on ETC designations).

¹²² 47 U.S.C. § 254(b).

¹²³ *See supra* ¶ 11.

should be subject to state regulation as a LEC for the BUS offering.¹²⁴ Section 332(c)(3)(A) provides for state rate regulation of CMRS upon petition if the state demonstrates that either of two conditions is met: “(i) market conditions with respect to such services fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory; or (ii) such market conditions exist and such service is a replacement for land line telephone exchange service for a substantial portion of the telephone land line exchange service within such State.”¹²⁵ The Kansas Commission has not filed such a petition, and there is no evidence that either of these market conditions exists in Kansas. Section 332(c)(3)(A) also permits state regulation that is necessary to ensure the “universal availability of telecommunications at affordable rates” if CMRS services are a “substitute for land line telephone exchange service for a substantial portion of the telecommunications in a state.”¹²⁶ The record does not reflect that CMRS represents a substitute for a substantial portion of the land line local exchange service in Kansas or that any particular regulations are necessary for universal service.¹²⁷

33. Finally, Independents also ask us to clarify the applicability of federal LEC regulation to BUS. As discussed above, the Commission has concluded that CMRS providers are not subject to LEC regulation regardless of whether they provide a substitute for local exchange service, and there is no record here to persuade us to depart from this conclusion in this instance.¹²⁸ Thus, Western Wireless in its provision of BUS is not subject to sections 251(b) or (c), but is subject to section 251(a).¹²⁹

IV. CONCLUSION

34. Based on the record in this proceeding, we find that BUS is CMRS and we decline to classify Western Wireless as a LEC when it provides BUS. We conclude that this finding is consistent with the intent of Congress in adopting section 332(c)(3)(A) and other provisions of the Act providing for limited regulation of CMRS offerings in order to further service availability and competition in local exchange services. As discussed herein, BUS is regulated pursuant to federal law as a CMRS offering. Kansas is precluded and preempted from imposing rate and entry regulations on Western Wireless’ BUS

¹²⁴ Independents’ Petition at 18, n. 48.

¹²⁵ 47 U.S.C. § 332(c)(3)(A). *See also CMRS Second Report and Order*, 9 FCC Rcd at 1505, ¶¶ 252-53; 47 C.F.R. § 20.13.

¹²⁶ 47 U.S.C. § 332(c)(3)(A).

¹²⁷ In its comments, Kansas states that Western Wireless’ BUS offering “does not appear, at this time” to constitute a substantial portion of the communications within Kansas based on the information provided in Western Wireless’ application, and requests that we clarify how a state would determine that commercial mobile services “are a substitute for a substantial portion of the communications within such State.” Kansas Commission Comments at 4. As discussed in the *CMRS Second Report and Order*, this determination requires information regarding the range of basic telephone service alternatives available to consumers in the state. *CMRS Second Report and Order*, 9 FCC Rcd at 1505, ¶ 253.

¹²⁸ The Commission may define CMRS providers that offer local exchange service as LECs under section 153(26), but it has not taken that action. 47 U.S.C. § 153(26). The Local Competition proceeding, in declining to regulate CMRS providers as LECs, clarified that whether CMRS providers are classified as LECs is within the sole discretion of the Commission. *Local Competition Order*, 11 FCC Rcd at 15499, ¶¶ 1004-1006.

¹²⁹ *See* 47 U.S.C. § 251(a) (general duties imposed on all telecommunications carriers); *see also supra* ¶ 7.

offering, but Kansas may regulate other terms and conditions, and Kansas may impose universal service regulations that are not inconsistent with section 332(c)(3)(A), other provisions of the Act, and the Commission's regulations.

V. ORDERING CLAUSE

35. IT IS THEREFORE ORDERED that pursuant to sections 1, 2, 4, and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154, and 405, and section 1.2 of the Commission's rules, 47 C.F.R. § 1.2, the Petition filed on November 3, 2000 by the State Independent Alliance and Independent Telecommunications Group regarding Western Wireless' BUS service is DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX**LIST OF COMMENTERS ON INDEPENDENTS' PETITION**Comments

1. Beacon Telecommunications Advisors (Beacon)
2. Cellular Telecommunications & Internet Association (CTIA)
3. Dobson Cellular Systems, Inc. (Dobson)
4. Kansas Corporation Commission (Kansas Commission)
5. National Telephone Cooperative Association (NTCA)
6. Nebraska Rural Independent Companies (Nebraska Independents)
7. Minnesota Independent Coalition (Minnesota Independents)
8. Organization for the Promotion and Advancement of Small Telecommunications Companies (OPASTCO)
9. Rural Iowa Independent Telephone Association (Iowa Independents)
10. Rural Telecommunications Group (RTG)
11. Rural Utilities Service, Department of Agriculture (RUS)
12. South Dakota Independent Telephone Coalition (South Dakota Independents)
13. Sprint Corporation (Sprint)
14. John Staurulakis, Inc. (Staurulakis)
15. United States Telecom Association (USTA)
16. Warinner, Gesinger & Associates (Warinner)
17. Western Wireless Corporation (Western Wireless)
18. Fred Williamson & Associates, Inc. (Williamson)

Reply Comments

1. AT&T Wireless Services, Inc. (AT&T Wireless)
2. Cellular Telecommunications and Internet Association (CTIA)
3. Rural Telecommunications Group (RTG)
4. John Staurulakis, Inc. (Staurulakis)
5. State Independent Alliance and Independent Telecommunications Group (Independents)
6. Townes Telecommunications, Inc. (Townes)
7. United States Cellular Corporation (U.S. Cellular)
8. United States Telecom Association (USTA)
9. Warinner, Gesinger & Associates (Warinner)
10. Western Wireless Corporation (Western Wireless)
11. Fred Williamson & Associates, Inc. (Williamson)

**CONCURRING STATEMENT OF
COMMISSIONER KATHLEEN Q. ABERNATHY**

Re: Petition of the State Independent Alliance and the Independent Telecommunications Group for a Declaratory Ruling that the Basic Universal Service Offering Provided by Western Wireless in Kansas Is Subject to Regulation as Local Exchange Service, WT Docket No. 00-239 (released August 2, 2002).

I concur with the result in this item because I agree with the majority that the service offering at issue should be regulated as a commercial mobile radio service (CMRS). Irrespective of whether the Telular terminal used by subscribers is a mobile or fixed station, I believe that the service is ancillary, auxiliary, or incidental to the traditional mobile cellular service provided by Western Wireless (Western).

Whether the Telular terminal qualifies as a mobile station presents a close call. There is no question that the equipment is “capable of being moved,” but there is a serious question whether it “ordinarily does move.” 47 U.S.C. § 153(28). As the order points out, the equipment is designed to operate while moving and there is evidence that a relatively small number of customers have roamed with it. I am nevertheless concerned that the weight of the evidence may suggest that the equipment “ordinarily” does *not* move. While it is possible to interpret the word “ordinarily” to mean “not aberrationally,” it appears that a more natural interpretation would focus on the *intended* or *typical* use of the equipment. Given that the equipment is relatively large and heavy compared to most of today’s mobile units, it operates on AC power and has only limited backup battery life, and it is designed to be used in conjunction with a traditional wireline telephone (that is, it has no integrated earpiece, speaker, or mouthpiece), it seems that consumers will not ordinarily use the Telular terminal in a mobile fashion.

I do not believe it was necessary for the Commission to resolve this difficult question, because the BUS offering is ancillary, auxiliary, or incidental to Western’s primary cellular service. BUS is provided over precisely the same infrastructure and equipment as the conventional cellular service; it differs only with respect to the customer premises equipment. A relatively small number of customers — 386, at the time of Western’s filing — subscribes to the service, in contrast with 45,000 traditional cellular customers in Kansas. The Commission’s rules make clear that CMRS carriers may offer services incidental to their primary services so long as the provision of the incidental service (a) does not increase the costs borne by primary subscribers, (b) does not materially deteriorate the quality of the primary mobile service, and (c) is not inconsistent with the Act or our rules. 47 C.F.R. § 22.323. These factors support the conclusion that Western’s BUS offering is incidental to its primary cellular offering. While our analysis could change in the future — for example, if Western deployed equipment dedicated to the BUS offering, or if the number of BUS subscribers increased substantially — the record before us indicates that the BUS service should be regulated as a mobile service.

**DISSENTING STATEMENT OF
COMMISSIONER KEVIN J. MARTIN**

Re: Petition of the State Independent Alliance and the Independent Telecommunications Group for a Declaratory Ruling that the Basic Universal Service Offering Provided by Western Wireless in Kansas Is Subject to Regulation as Local Exchange Service, Memorandum Opinion and Order, WT Docket No. 00-239.

I dissent from the majority's determination that Western Wireless's "Basic Universal Service" offering in Kansas is a "commercial mobile service" and is therefore not subject to regulations applicable to wireline local exchange carriers. As a matter of statutory interpretation, I do not agree that the Western Wireless terminals, which are larger and heavier than many VCRs and most lap top computers manufactured today, "ordinarily" move in the manner of typical mobile phones. I also find it difficult to believe this "Basic Universal Service" offering, which is designed specifically to qualify for universal service subsidies, should be deemed exempt from regulations and universal service fund requirements applicable to wireline local exchange carriers providing essentially the same service.

Under the Communications Act, a "commercial mobile service" is defined, in relevant part, as a service utilizing "a radio-communication station capable of being moved and which ordinarily does move." 47 U.S.C. § 153(28); *see id.* §§ 332(d)(1) and 153(27). Thus, as the majority acknowledges, the central questions in this matter are (1) whether a Western Wireless Basic Universal Service terminal is "capable of being moved" and (2) whether the terminal "ordinarily does move."

I disagree with the majority's conclusion that a Basic Universal Service terminal "ordinarily does move." This terminal, which is marketed as a substitute for a traditional wireline phone, is a "laptop-sized unit . . . powered by electricity. . . ." Order ¶ 9. The terminal is "2.76 inches x 12.9 inches x 11.8 inches and weighs 8.3 pounds." *Id.* (footnoted omitted). When operating on a battery, it is only capable of providing "one hour of talk time." *Id.* In other words, this terminal is about the size and weight of an older VCR or lap top computer and provides similar functionality to a typical wireline phone.

I believe that this device is too large, too heavy, and too lacking in mobile usefulness for a reasonable person to find that it "ordinarily" moves, as do other wireless devices. In fact, the Basic Universal Service terminal is larger and more cumbersome than any cell phone sold today, any PDA, or any pager, and provides essentially no additional functionality. In the past, mobile "bag" phones may have been this large or this heavy – as the Order points out – but in the past, this size may have been necessary for the functionality provided. The Basic Universal Service terminal is built and marketed at a time when the same functionality can be provided by a device that is less than half its size and less than half its weight. I find no functional reason that the device was made this large and heavy. Rather, the record suggests, the Basic Universal Service terminal was designed this way to emphasize that Basic Universal Service is like traditional wireline phone service, so that it could qualify for universal service subsidies. Whatever the merits of this design decision, the consequence is that – like a wireline phone – a Basic Universal Service terminal does not ordinarily move.

I also disagree with the majority's conclusion that, even if Basic Universal Service does not meet the statutory definition of a "commercial mobile service," it should still be considered as such because Basic Universal Service is "ancillary, auxiliary, or incidental" to traditional mobile cellular service provided by Western Wireless. *See id.* ¶ 26. The majority concludes that, based on Commission precedent, "a service provided by a cellular licensee can be treated as incidental for regulatory purposes even if the service is entirely fixed." *Id.* ¶ 28. The majority finds that Basic Universal Service is "incidental" here because it "is provided over the same spectrum and infrastructure as that Western Wireless uses to provide conventional mobile cellular service" *Id.* ¶ 27 (footnote omitted).

I find this reasoning troubling. While I might agree that certain “incidental” services provided over a mobile system should not change the “mobile” character of the system, I am uncomfortable with the majority’s conclusion here. In short, I do not see how the statute’s definition of “mobile” service can be read to encompass an entirely fixed service, merely because the fixed service uses the same network as a mobile service. I find this reasoning to be inconsistent with the statute. Accordingly, I respectfully dissent.